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No. 72

Supreme Court of the United States

OCTOBER TERM, 1933.

RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, doing business under the firm name and style of R. J. FUNKHOUSER & COMPANY,

Appellants,

against

J. B. PRESTON COMPANY, INC.,

Appellee.

APPELLANTS' BRIEF

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Counsel for Appellants,
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New York City.

INDEX

PAGE

Statement 2

ARGUMENT:

POINT I—The constitutional questions were properly reserved 6

POINT II—Section 480 of the New York Civil Practice Act as amended impaired the obligation of appellants' contract 7

POINT III—The amendment to Section 480 of the Civil Practice Act deprives the appellants of property without due process of law 21

POINT IV—Conclusion 23

INDEX TO STATUTES.

Section 480 of New York Civil Practice Act (Chap. 925 N. Y. Laws of 1920 as amended by Chap. 623 N. Y. Laws of 1927) 5

Chap. 925, Section 562, General Laws of N. Y. 1920 (Notice of Appeal) 6

U. S. Constitution 5, 10, 15

PRESENT CASE REPORTED.

Preston v. *Funkhouser*, 235 App. Div. (N. Y.) 200, 261 N. Y. 140 14

Arnold & Murdock Co. v. *Industrial Commission*, 314, Ill. 251, 145 N. E. 342 22
Bank of Minden v. *Clement*, 256 U. S. 126, 128.... 13
Barnitz v. *Beverly*, 163 U. S. 118, 16 S. Ct. 1042... 18
Barton v. *Conley*, 112 Atl. 670, 119 Me. 581..... 21
Columbia Ry. Gas & Electric Co. v. *State of South Carolina*, 261 U. S. 236, 251 .....13, 14
Coombs v. *Getz*, 285 U. S. 434 .....10, 13, 16, 22
Denny v. *Bennett*, 128 U. S. 494 18
Etter v. *Tacoma*, 228 U. S. 148, 155 22
Edwards v. *Kearzey*, 96 U. S. 595 .....17, 18, 21
Faber v. *City of New York*, 222 N. Y. 255 8
Forbes Pioneer Boat Line v. *Board of Commissioners*, 258 U. S. 338 22
Gauthier v. *Penobscot Chemical Fibre Co.*, 113 Atl. 28 22
Gray v. *Central Railroad Company of New Jersey*, 157 N. Y. 483 ..... 7, 15
Green v. *Biddle*, 8 Wheat. 75 18
Hays v. *Seattle*, 226 Fed. 287, 293 11
In re Messinger, 29 Fed. (2d) 158 18
Jacobus v. *Colgate*, 217 N. Y. 235 .....11, 15
Morley v. *Lake Shore & M. S. Ry. Co.*, 146 U. S. 192 16
Nelson v. *St. Martin's Parish*, 111 U. S. 716, 720..17, 21
Northern Pacific v. *Wall*, 241 U. S. 87 18
O'Connor v. *Hartford Accident and Indemnity Co.*, 97 Conn. 8; 115 Atl. 484 19
Ogden v. *Saunders*, 12 Wheaton 317 .....10, 11, 12
Planters' Bank v. *Sharp*, 6 How. 327 .....13, 17
Rabor v. *City of New York*, 222 N. Y. 255 15
Richardson v. *Cook*, 37 Vt. 599, 602 12
Rothschild v. *Knight*, 84 U. S. 334, 22 S. C. 391, 393 7
Sackstein v. *Pigueron*, 215 N. Y. 62 15
Sweeney v. *State*, 251 N. Y. 417, modifying 225 App. Div. 606 .....10, 14, 16
Union Pacific R. R. Co. v. *Laramie Stockyards Co.*, 231 U. S. 190 15

SUPREME COURT OF THE UNITED STATES

RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, doing business under the firm name and style of R. J. FUNKHOUSER & COMPANY,

Appellants,

against

J. B. PRESTON COMPANY, INC.,

Appellee.

APPELLANTS' BRIEF.

This is an appeal from that part of a judgment of the Supreme Court of the State of New York, County of New York, in so far as it allows appellee interest upon the damages assessed in appellee's favor.

The original judgment was entered in said court on the 12th day of May, 1930, in the sum of $60,687.27 (R. 15). Said judgment was thereafter modified by the Supreme Court of the State of New York, Appellate Division, First Department, by striking out the allowance of $14,417.57 as interest and as so modified affirmed the said judgment of the Supreme Court (R. 32, 33). The judgment of said Appellate Division was thereafter modified by the Court of Appeals of the State of New York (R. 38) by restoring the interest disallowed by the said Appellate Division.

Judge LEHMAN of the Court of Appeals dissented without opinion.

The order and judgment of said Court of Appeals was thereafter made the order and judgment of the said Supreme Court on the 6th day of March, 1933 (R. 43-45).

Thereafter the appellants, by an order of the Court of Appeals of the State of New York dated April 8, 1933, were allowed to appeal to this court from so much of the said judgment of the said Supreme Court as allowed and awarded interest to the appellee (R. 46-47).

Statement.

On or about the 25th day of January, 1923, the appellants and appellee entered into a contract Exhibit "B" (R., pp. 6, 7, 8).

Under the terms of said contract the appellants agreed to purchase and the appellee agreed to sell to appellants 15,000 tons of red slate granules during the year 1923 and a like quantity each year thereafter for three successive years (R., p. 7).

The complaint (R., pp. 2, 3) alleges that the appellants ordered and accepted 34,708.56 tons of 60,000 tons agreed to be purchased. The appellants failed to take 25,291.44 tons. The complaint alleges that the damages suffered by the appellee were "whatever profits the plaintiff might make on the contract to sell and deliver red slate granules to the defendants" (R. 3).

The trial court assessed damages as follows:

For failure to accept 10,178 tons for the year 1923 (R. 18)	$20,256.00	(R. 22)
For failure to accept 2,963 tons for the year 1924 (R. 18)	5,926.00	(R. 22)
For failure to accept 6,885 tons for the year 1925 (R. 18)	13,770.00	(R. 22)
For failure to accept 5,306 tons for the year 1926 (R. 18)	5,837.70	(R. 22)
	$45,799.70	(R. 22)

The trial court also added interest in the sum of $14,281.57 (R. 22). This was later changed to $14,417.57 (R. 15) and as so changed inserted in the extract of the Clerk's minutes and the judgment appealed from (R. 14-15).

The trial court in an unreported decision assessed appellee's damages upon the said contract for the years 1923 to 1926 inclusive and stated (R. 20):

"Considering the nature of this contract, it is obvious that the parties understood that the product was to be manufactured to meet defendant's demands indicated by orders and that in case defendants failed to order, plaintiff would not manufacture, *and its loss would be its profit represented by the difference between the cost to them of manufacturing the product and what they were to receive under the contract.*" (Italics ours.)

It is clear from the record that the contract was entered into, performed, and the appellee's cause of action accrued prior to the enactment of the amendment to the New York Statute hereinafter referred to. The nature of the appellee's claim for damages and the measure thereof was, as the trial court found (R. 21), the difference between the contract price and the cost of production, that is, loss of profit. The complaint as hereinabove stated was also based upon this theory. The trial court awarded damages on this theory and the courts below consided the damages were "unliquidated" (R. 37 to 40). That the damages were unliquidated or unascertainable is evident by comparing the loss claimed by the appellee (Exhibit 21) (R. 26 to 31) and the loss found by the court (R. 22).

	Appellee's Loss per Ton	*Court Found per Ton*
1923	$3.584 (R. 27)	$2.00
*	2.184 (R. 27)	2.00
1924	3.147 (R. 28)	2.00
1925	3.155 (R. 29)	2.00
1926	2.235 (R. 30)	1.10

*Appellee's own figures for 1923 were conflicting.

Specification of errors assigned and urged upon this appeal:

"1. The Court of Appeals of the State of New York erred in holding that the awarding of interest upon the damages sustained by the plaintiff under Section 480 of the New York Civil Practice Act as amended April 4, 1927, did not impair the rights and obligations of the defendants under the contract entered into in the year 1923.

"2. The Court of Appeals of the State of New York erred in holding that the awarding of interest upon the damages sustained by the plaintiff under Section 480 of the New York Civil Practice Act as amended April 4, 1927, did not deprive the defendants of property without due process of law.

"3. The Court of Appeals of the State of New York erred in holding that the awarding of interest upon the damages sustained by the plaintiff was a matter of remedy and not of right.

"4. The Court of Appeals of the State of New York erred in holding that Section 480 of the New York Civil Practice Act as amended April 4, 1927, in so far as the same applied to contracts entered into prior to April 4, 1927, did not violate Article I, Section 10, and the Fourteenth amendment thereto, of the Constitution of the United States.

"5. The Court of Appeals erred in modifying the order and judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, by restoring interest in the sum of $14,417.57 and as so modified, affirming the judgment of the said Appellate Division and of the Trial Court."

The statute in question which will hereinafter be referred to as Section 480 of the Civil Practice Act as amended, reads as follows:

> "Interest to be included in recovery. Where *in any action* final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the *total amount* awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the *total amount* awarded, and included in the amount of the judgment. *In every action now pending or hereafter brought wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded.*" New York Laws, 1920, Chapter 925, as amended by Chapter 623 of the Laws of 1927 in effect April 4, 1927. (Italicized portions indicate the amendment enacted by Chapter 623 of the New York Laws of 1927.)

Articles of Constitution on which appellants rely.

Art. I, §10 "No State shall * * * pass any * * * law impairing the obligation of Contract."

Art. XIV, §1 "* * * nor shall any State deprive any person of * * * property, without due process of law; * * *."

Argument.

POINT I.

The constitutional questions were properly reserved.

The laws of the State of New York do not provide for a bill of exceptions upon appeal. The General Laws of New York, 1920, Chapter 925, Section 562, provides that:

> "An appeal must be taken by serving upon the attorney for the adverse party, and upon the clerk with whom the judgment or order appealed from is entered by filing in his office, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof."

Appellants duly appealed to the Appellate Division of Supreme Court of the State of New York (R. 1).

The constitutional questions were considered by the Appellate Division, 235 A. D. 200, and by the Court of Appeals in 261 N. Y. 140.

The appellants in their briefs in the said Appellate Division and in the Court of Appeals questioned the validity of said Section 480 of the Civil Practice Act as amended upon the ground that it contravened the provisions of Article I, Section 10 and Article 14, Section I of the United States Constitution. The points and errors which the appellants claim were made could be raised only in their briefs. In the present case the appellants' notice of appeal to the Appellate Division properly raised all errors. The Appellate Division considered the questions now raised in this court (R. 37). While the Court of Appeals did not discuss the due process clause, by reference it discussed the rights of the appellants (R. 42) and the question was raised under Point 10 of the appellants' brief in the Court of Appeals.

In *Rothschild* v. *Knight,* 184 U. S. 334, 22 Supreme Court 391, 393, this court stated:

> "A motion is made to dismiss the writ of error upon the ground that no Federal question was raised in the superior court. Federal questions were raised, however, on writ of error to the Supreme Court, and that, we think, was a sufficient claim. Meyer v. Richmond, 172 U. S. 82, 43 L. Ed. 374, 19 Sup. Ct. Rep. 106; Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. Ed. 243, 6 Sup. Ct. Rep. 1023; Sully v. American Nat. Bank, 178 U. S. 289, 44 L. Ed. 1072, 20 Sup. Ct. Rep. 935."

It is therefore submitted that the constitutional questions were properly reserved and are properly before this court.

POINT II.

Section 480 of the New York Civil Practice Act as amended impaired the obligation of appellants' contract.

A. *Prior to enactment no interest was recoverable in New York on contract actions where the damages sustained were "unliquidated."*

The leading case in New York State on this subject is *Gray* v. *Central Railroad Company of New Jersey,* 157 N. Y. 483; in which the court disallowed the claim for interest and wrote, at page 485:

> "* * * The important question for us to determine arises upon the plaintiffs' appeal from the determination of the general term that the jury should not have been allowed to add interest to the amount in which they found the plaintiffs to have been dam-

aged. This being an action for the recovery of unliquidated damages, whether interest was recoverable therein depended upon how far the plaintiffs' demand was such that it was capable of being ascertained or computed, if only approximately, by reference to established market values. That is to say, if this case were one where, according to the evidence, it appeared that a steamboat, like the one in question, had a more or less well-established value in the market, so that, upon the indefensible refusal of the defendant to complete its contract of purchase, it could be said to have been chargeable with a knowledge of the damage sustained, actual or approximate, then the plaintiffs' recovery should carry interest, as a matter of law. * * *

"* * * But that there was a 'market value' or 'price', in the ordinary sense of those terms, for such an article, was not made out by the evidence, or, at least, not in a satisfactory or conclusive manner."

To the same effect see *Faber* v. *City of New York,* 222 N. Y. 255.

The trial court in the present action stated (R. 20, 21):

"Considering the nature of this contract, it is obvious that the parties understood that the product was to be manufactured to meet defendant's demands indicated by orders and that in case defendants failed to order, plaintiff would not manufacture, and its loss would be its profit represented by the difference between the cost to them of manufacturing the product and what they were to receive under the contract.

"That this was the understanding of the parties is further indicated by the fact that the contract price was, at the time the contract was made and during its entire life, considerably below the so-called market price which represented the price at which the

defendants would resell the merchandise to the roofing trade, and had no application to a contract such as this.

"Certainly, these plaintiffs were under no obligation to manufacture these goods which were not ordered and attempt to sell them to someone else in order to minimize the damage resulting from the defendant's breach of its contract.

"The proper measure of damages, under the peculiar circumstances of this contract, I am convinced, was the difference between the contract price and the cost to plaintiffs of manufacturing the merchandise to be delivered."

The Appellate Division of the Supreme Court in this action stated (R. 37):

"There is another important question involved which requires our consideration. *Interest was allowed on unliquidated damages. That this claim was clearly unliquidated appears to be beyond question.* Prior to 1927, interest could not be recovered on such a claim. During the year, 1927, a statute was enacted allowing interest on all unliquidated claims. The question arises, however, whether interest may be allowed on such a claim which arose prior to the enactment of that statute." (Italics ours.)

The Court of Appeals also recognized and conceded that interest, prior to the amendment of said Section 480 of the Civil Practice Act, would not have been allowed, on the ground that the damages were unliquidated, or, as the Court of Appeals chose to express it by citation from another case (R. 41) "Was the plaintiff entitled to a certain sum?" The Court of Appeals stated (R. 40, 41):

"The court below has held that so much of the statute as makes it compulsory to allow interest on unliquidated claims cannot apply to a claim for

unliquidated damages on a contract entered into before April 4, 1927, as the obligation of such contract would be thereby impaired. (*cf. Sweeney* v. *State,* 251 N. Y. 417, modifying 225 App. Div. 606.) 'No state shall * * * pass any * * * law impairing the obligation of contracts.' (*U. S. Cons. Art I, Sec. 10.*) 'A contract is an agreement by which a party undertakes to do or not to do a particular thing.' (*Ogden* v. *Saunders,* 12 Wheaton 317.) By the obligation of a contract is meant the legal obligation of the parties to adhere to the agreement which at the time of contracting the law recognized and made enforceable. (*Ogden* v. *Saunders, supra.*) The question thus resolves itself into this: When the parties enter into a contract the breach of which results in a claim for unliquidated damages, do the parties make an agreement that no interest shall be charged on the principal sum found due which agreement would be impaired by a later statute which permits the recovery of interest? (*Coombs* v. *Getz,* 285 U. S. 434)."

And also (R. 42):

"The amendment to C. P. A. Sec. 480 changes a rule of the common law but it conflicts with no constitutional guarantee. * * *"

The Court of Appeals did not overrule the holding of the Appellate Division that the damages were unliquidated (see especially last sentence of quotation above taken from R. 41), but reversed the Appellate Division on the following ground (R. 42):

"* * * It follows that Sec. 480 is a remedial statute to be construed, according to its literal meaning, to apply to all actions brought after it went

into effect, irrespective of the time when the cause of action arose. It changes an existing right of action rather than creates a new right. It vindicates a preexisting right to compensation for breach of contract (*Jacobus* v. *Colgate*, 217 N. Y. 235) which the courts have found it impossible to recognize by reason of difficulties in the way of computing interest."

The Court of Appeals did not hold that the damages allowed were such that appellee would in any event have been entitled to interest.

B. The amendment of Section 480 of the Civil Practice Act, in so far as it affected contracts entered into prior to its enactment, impaired the obligation of appellant's contract.

In *Ogden* v. *Saunders*, 12 Wheat. 213, 318, this court stated:

"The obligation of the contract consists in the power and efficacy of the law, which applies to, and enforces performance of, the contracts, *or the payment of an equivalent for non-performance.* The obligation does not inhere, and subsist in the contract itself, *proprio vigore,* but in the law applicable to the contract. This is the sense, I think, in which the constitution uses the term obligation." (Italics ours.)

In *Hays* v. *Seattle*, 226 Fed. 287, 293, the court stated:

"* * * The obligation of a contract is and can be nothing less than that which obliges a person to perform his contract or repair the injury done by a failure to perform it * * *."

In *Richardson* v. *Cook*, 37 Vt. 599, 602, the court stated:

> "The 'obligation of a contract' within the meaning of the constitution, is not merely the moral obligation of the party who has received the consideration, and is therefore equitably bound to perform the agreement on his part, but it is the legal obligation, which embraces not only the right of the party entitled to performance, but the power by law to enforce and consummate that right by compelling the performance. It is this legal obligation,—this right to enforce and make effectual by legal compulsion, in the case of unexecuted contracts, which the state legislatures are forbidden to impair."

It follows therefore that under the contract in question it was the obligation of appellants to take the merchandise which they agreed to take, and in the event of their failure to take the merchandise in accordance with the contract it was their obligation under the contract to pay damages. It was their obligation at the time of the execution of this contract to pay damages, and damages only without interest being added thereto (A Point II of this brief). Section 480 of the Civil Practice Act as amended as the Court of Appeals has held gave to appellees not only the obligation of appellants to pay the damages, but has added thereto an additional obligation, *i. e.*, to pay interest on the damages. It has added to appellants' obligation under the contract, an obligation which was not a part thereof at the time of its execution, *i. e.*, a further condition to perform—to pay interest.

The obligation of appellants under the contract to pay damages for non-performance subsisted not in the contract itself, but in the law applicable thereto (*Ogden* v. *Saunders*, 12 Wheat. 213, 318). The law applicable thereto at the time of its execution did not require payment of interest on damages in a case like the present one.

In *Bank of Minden* v. *Clement,* 256 U. S. 126, 128, the court quoted with approval the opinion of Mr. Justice WOODBURY in *Planters' Bank* v. *Sharp,* 6 How. 327:

> "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

This court thereupon held that a Louisiana statute, which undertook to exempt from debts of the assured the avails of an insurance policy upon his life taken out prior to the passage of the act and payable to his estate was invalid and was in conflict with the Federal Constitution, to the extent that the act deprived a debtor of the insured of his right to proceed to collect a debt incurred prior to the passage of the act from the estate of the insured and the proceeds of said policy.

In *Columbia Ry. Gas & Electric Co.* v. *State of South Carolina,* 261 U. S. 236, 251, this court stated:

> "* * * The impairment of a contract may consist in increasing its burdens as well as in diminishing its efficiency."

In *Coombs* v. *Getz,* 285 U. S. 434, 451, Mr. Justice CARDOZO in a dissenting opinion stated:

> "* * * The obligation of the petitioner's contract is whatever the law of California attaches to the contract at the hour of its making. * * *"

This is not in conflict with the majority opinion which stated at page 442:

> "* * * The right of this petitioner to enforce respondent's liability had become fully effected and vested prior to the repeal of the liability provision. * * * It did not arise upon the constitutional rule of law but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. * * *"

The law existing at the time of the execution of the contract in question, January 23, 1923 (R. 6), and at the conclusion thereof, December 31, 1926 (R. 7, 18, 22), when the cause of action arose on the entire four years, was that no interest could be recovered on the damages awarded. (See A of this Point I.)

The obligation of appellants under the contract in question did not include the payment of interest. Thereafter Section 480 of the Civil Practice Act was amended and as a result thereof interest in the sum of $14,417.57 was awarded (R. 32, 45) to the appellee and incorporated in the judgment. The burden of appellants under said contract was increased and the contract impaired. *Columbia Ry. Gas & Elec. Co.* v. *State of South Carolina,* 261 U. S. 236, 251.

Prior to the decision of the Court of Appeals herein (R. 40-43) no court of last resort so far as appellants have been able to ascertain had decided the precise question now raised.

The Appellate Divisions of the First and Fourth Departments had previously decided the amendment to Section 480 of the Civil Practice Act so far as retroactive was unconstitutional. *Preston* v. *Funkhauser,* 235 App. Div. 200; *Sweeney* v. *State of New York,* 225 N. Y. App. Div. 605, reversed on other grounds, *251 N. Y. 417.* In *Sweeney* v. *State of New York,* 225 New York App. Div. 605, the Appellate Division, Fourth Department, stated:

"This was a claim for unliquidated damages resultant from breach of contract. The contract and circumstances involved are such that, under the common law, the pecuniary loss to claimant as of a fixed time could not have been ascertained by the State with reasonable certainty by computation alone, or in connection with generally recognized standards (*Rabor* v. *City of New York*, 222 N. Y. 255 * * *; *Gray* v. *Central R. R. of New Jersey*, 157 N. Y. 483 * * *).

"The last sentence of Section 480, Civil Practice Act, makes compulsory the allowance of interest in pending actions upon claims for unliquidated damages for breach of contract. This enactment did not become effective until April 4, 1927. As applied to this case, this portion of the section is *ex post facto*, and deprives the State of New York of property without due process of law (United States Constitution, Art. XIV, Section 1; Constitution of the State of New York, Art. I, Section 6). The matter of interest allowed involved a substantial right, and not merely a question of procedure. Statutes are presumptively applicable in future only (*Jacobus* v. *Colgate*, 217 N. Y. 235 * * *; *Union Pacific R. R. Co.* v. *Laramie Stockyards Co.*, 231 U. S. 190 * * *). They are retroactive as to procedural matters, but not when vested or substantial rights are being determined (*Sackstein* v. *Pigueron*, 215 N. Y. 62 * * *).

The Court of Appeals reversed this decision of the Appellate Division in *251 N. Y. 417*, leaving open the question raised herein and in its opinion, at page 419, stated:

"The Appellate Division held the statute unconstitutional in its retroactive operation, on the ground that the effect was to deprive the state of property without due process of law.

> "There is no occasion to consider at this time whether the statute, in so far as retroactive, may be sustained against persons other than the state itself. Certain it is that the state which enacted it may not be heard to complain that the enactment is void as a violation of 'due process.'"

In the present case the constitutional questions raised upon this appeal were brought to the attention of the Appellate Division of the Court of Appeals. The Court of Appeals fully considered the constitutional questions raised (R. 40) and has reversed the holding of the Appellate Division, and while not directly mentioning the decision of the Appellate Division in *Sweeney* against the *State of New York,* the Court of Appeals did in effect overrule that decision.

The Court of Appeals having considered the constitutional questions and having ruled that Section 480 applied to all actions brought after it went into effect irrespective of the time when the cause of action arose and that where the statute deals only with a remedy the creation of a new or more adequate remedy does not impair the obligation of a contract (R. 42), this court should therefore consider independently of the decision of the State Court whether there is a contract the obligation of which is within the protection of the contract clause of the Constitution and whether that obligation has been impaired. *Coombs* v. *Getz,* 285 U. S. 441.

The present case is not one where the rate of interest allowed on a judgment has been changed after the entry of a judgment. *Morley* v. *Lake Shore & M. S. Ry. Co.,* 146 U. S. 192. No question of the police power of the State of New York is involved nor is the statute, a statute allowing damages in addition to those allowed at common law as a penalty for the unreasonable defense of an action.

In *Nelson* v. *St. Martin's Parish,* 111 U. S. 716, 720, this court stated that by the obligation of a contract is meant the means which at the time of its creation the law affords for its enforcement.

In *Edwards* v. *Kearzey,* 96 U. S. 595, this court stated, page 600:

> "The obligation of a contract includes every thing within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' *1 Bac. Arb., tit.* Actions in General, letter B."

Page 601:

> "'One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force.' *Planters' Bank* v. *Sharp, et al.,* 6 How. 301.
>
> "It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account."

Page 607:

> "The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived, and which will be the ground of our judgment.

"The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void."

Edwards v. *Kearzey* has been followed and reaffirmed in *Denny* v. *Bennett,* 128 U. S. 494; *Northern Pacific* v. *Wall,* 241 U. S. 87; and *In re Messinger,* 29 Fed. (2d) 158.

In *Barnitz* v. *Beverly,* 163 U. S. 118, 16 S. Ct. 1042, a Kansas law providing that a mortgagor shall have eighteen months to redeem the foreclosed premises with full right of possession during that time was unconstitutional and impaired the obligation of the mortgagee's mortgage which was executed and entered into prior to the passage of the act in question. Mr. Justice Shiras in his opinion quoted with approval from *Green* v. *Biddle,* 8 Wheat. 75:

"'It was the plaintiff's absolute and undoubted right, under an ordinary mortgage deed, if the survey was not paid at the appointed day, to go into the Court of Chancery, and obtain its order for the sale of the whole mortgaged property, if the whole is necessary, free, and discharged from the equitable interest of the mortgagor. This is his right by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

'When this contract was made, no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court, and it must therefore be governed, and the rights of the parties under it measured, by the rules

as above stated. They were the laws of Illinois at the time, and therefore entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree. Yet no one doubts his right or his remedy; for, by the laws of the state then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it, and any subsequent law impairing the rights thus acquired impairs the obligations which the contract imposed.' "

In *O'Connor* v. *Hartford Accident and Indemnity Co.*, 97 Conn. 8; 115 Atl. 484, the court held that a Connecticut law which provided that no contract of insurance should be cancelled by any agreement between the insurer and the assured after the assured had become responsible for loss or damage and that any such cancellation should be void, was unconstitutional in so far as it applied to insurance policies executed subsequent to the execution of a contract of insurance. The court stated, page 486 (Atlantic Reporter):

"* * * To impair the obligation of a contract is to weaken it or lessen its value or make it worse in any respect or in any decree. Any law which changes the intention and legal effect of the original parties giving to one a greater and to the other a less interest or benefit in the contract impairs its obligation. The extent of the change is immaterial * * *"

Appellants recognize that they have no vested right that any rule of law shall remain unchanged so far as the same applies to the interpretation of a particular statute by the court of last resort of that State as was stated by the opinion of the Court of Appeals below (R. 42).

In this case, however, the Court of Appeals was not construing what the common law was or is, but specifically stated that said Section 480 changed a rule of common law (R. 42).

It is submitted that under the United States Constitution, Article I, Section 10, the evil sought to be restrained was the enactment by a State legislature of a law which impaired the obligation of a contract and not the construction of the common law or the laws of a particular State by the courts of that State. The obligations of the parties under the contract in question became fixed at the time of the signing of the contract in 1923, and it is submitted that any statute which imposed a greater or less obligation on either of the parties under that contract subsequent to its execution under the definitions above referred to impaired the obligation of that contract.

C. Assuming Section 480 of the Civil Practice Act is a remedial statute, it materially encroached on the obligation of the appellant's contract.

The question of materiality in the present case is best shown by the fact that the interest awarded was $14,417.57. The appellee could wait until his statute of limitations had almost expired then sue upon the contract and by the time the same could be reached for trial or decided the amount of interest would almost equal the amount of damages recovered, and in the meantime the appellants would have no way of ascertaining with any degree of certainty the amount of damages to which they must respond.

Therefore even assuming that the Court of Appeals below was correct in holding that Section 480 of the Civil Practice Act as amended was purely a remedial statute, did not create a new right but merely changed the nature of the action (R. 42), nevertheless interest at the rate of 6% per annum is a substantial amount and not immaterial. *Edwards* v. *Kearzey*, 96 U. S. 595, 607; *Nelson* v. *St. Martin's Parish*, 111 U. S. 716, 720.

In *Barton* v. *Conley*, 112 Atl. 670, 119 Me. 581, the court held that a statute which provided that the right of redemption in a foreclosure action was forever barred provided that an affidavit was within three months after the expiration of one year from the taking of possession recorded in the registry of deeds was remedial and did not impair the obligation of a contract. This case was affirmed by this court in 260 U. S. 677, 43 Supreme Court 238, and clearly shows that the matters upon which a state may legislate with respect to remedies is limited to those statutes which do not lessen the value of the contract and relate solely to procedure, evidence, and presumptions, but that where the value of the contract has been lessened or impaired the statute is no longer remedial but affects the expressed terms of the contract and the statute and common law in effect at the time of the execution of the contract and which became a part of the contract and measured the rights and obligations of the parties thereunder.

POINT III.

The amendment to Section 480 of the Civil Practice Act deprives the appellants of property without due process of law.

The appellee's cause of action arose in any event at the close of the year 1926, the expiration date of the contract. The right of the appellee was fixed by the law in force in the State of New York at that time and

the right so vested cannot be defeated or cannot be enlarged by subsequent litigation. *Coombs* v. *Getz*, 285 U. S. 443. In *Etter* v. *Tacoma*, 228 U. S. 148, 155, this court stated:

> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

In *Arnold & Murdock Co.* v. *Industrial Commission*, 314 Ill. 251, 145 N. E. 342, the court stated page 344 (Northeastern):

> "* * * A right is vested when its enjoyment, present or prospective, has become the property of a particular person as a present interest. Pearsall v. Great Northern Ry. Co., 161 U. S. 646 * * *."

In *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338, the court held that a state legislature could not take away from a private party a right to recover money that was due when the act was passed. See also *Gauthier* v. *Penobscot Chemical Fibre Co.*, 113 Atl. 28.

The present case is analogous to the cases above cited and is clearly within the rule therein stated.

POINT IV.

Conclusion.

The judgment of the Supreme Court of the State of New York and that of the Court of Appeals of the State of New York should therefore be modified by striking out the allowance of interest and the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, affirmed.

GEORGE LINK, jr.,
Counsel for Appellants.